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Before the  
**Federal Communications Commission**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )

GAF BROADCASTING COMPANY, INC., )

For Renewal of License of Station )  
 WNCN (FM), New York, New York )CLASS ENTERTAINMENT AND )  
 COMMUNICATIONS, L.P. )

THE FIDELIO GROUP, INC., )

For a Construction Permit for a New FM Station )  
 on 104.3 MHz at New York, New York )

MM Docket No. 93-54

File No.  
 BRH-910201WLFile No.  
 BPH-910430MEFile No.  
 BPH-910502MQ

To: The Commission

**COMMENTS ON OPPOSITION TO MOTION FOR DEFERRAL OF  
 PROCEDURAL DATES**

LISTENERS' GUILD, INC. ("Guild"), by its attorney, hereby respectfully comments on the *Opposition to Motion for Deferral of Procedural Dates* filed by GAF Broadcasting Company, Inc. ("GAF") on April 20, 1993 in opposition to the *Motion for Deferral of Procedural Dates* filed on April 12, 1993 by The Fidelio Group, Inc. ("Fidelio"). Although the Guild is not "[t]he person who filed the

opposition that are largely aimed at the Guild;<sup>1</sup> hence, it is being filed within the period provided by the Commission's Rules for the filing of a reply.<sup>2</sup>

At the outset, the Guild takes vigorous exception to GAF's distortions of the Guild's role herein and in prior proceedings. First, and most serious, is GAF's unfounded contention that Fidelio has brought the instant *Motion "On Behalf Of The Guild,"* see *GAF Opposition* at 6-8.

Despite the statement and supporting affidavits in the Guild's May 1 1991 *Petition to Deny* that "[t]he Guild has no economic or financial stake in any broadcast . . . applicant," including Fidelio,<sup>3</sup> GAF now alleges, without any evidentiary support, that "Fidelio is largely a creation of the Guild," *id.* at 8, describes the Guild as "Fidelio's sister group," *id.* at 10, and echoes its charge in prior proceedings<sup>4</sup> of a coordinated attack "on two fronts," *id.* at 8. Such unsupported allegations, willfully repeated by GAF in the face of contrary affidavits,<sup>5</sup> are not worthy of the Commission's consideration and should be completely disregarded.

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1. Since the Guild does not oppose, but rather supports Fidelio's *Motion*, it was neither necessary nor appropriate for it to file an "opposition" pursuant to 47 C.F.R. § 1.45(a). However, it is appropriate for the Guild to respond to the attacks upon it contained in GAF's *Opposition*, which, after all, treated the Fidelio *Motion* as if it had been made by the Guild. See *GAF Opposition* at 6-8.
  2. As Fidelio's *Motion for Deferral of Procedural Dates* was filed on April 12, 1993, oppositions thereto were required to be filed by April 26, 1993, 47 C.F.R. §§ 1.4(h),(j); 1.45(b) (1992), and a reply is required to be filed by May 6, 1993, 47 C.F.R. §§ 1.4(g)-(i); 1.45(b) (1992). To the extent that the *Mass Media Bureau's Motion to Dismiss* Fidelio's *Motion* may be treated as an opposition thereto, the instant comments should be regarded as replying to the Bureau's pleading.
  3. See the Guild's *Petition to Deny*, May 1, 1991, at 2, Exh. A, para. 4 & Exh. B, paras. 1-2. This was recently reiterated, again with affidavit support, just one day prior to the filing of GAF's *Opposition*, in the Guild's *Petition for Intervention*, July 19, 1991, at 2 & Exh. B at 2-3.
  4. See GAF's *Consolidated Opposition to Petitions to Deny*, July 1, 1991, at 4. (The Guild "has launched its attack on two fronts.")
  5. In contrast, it is characteristic of GAF's ongoing posture before the Commission that its allegations again are unsupported by affidavit. Indeed, virtually nothing alleged by GAF in the present renewal proceedings as well as in the transfer of control proceeding to which it has referred, *Opposition* at 2, has been supported by affidavit. This at best

Furthermore, GAF's attempt, by unexplained innuendo, to portray the Guild's role in the pending renewal proceeding as a repetition of its position in two prior renewals, *Opposition* at 8, is also a serious distortion. As GAF is well aware, the circumstances and the posture of the Guild on each of the earlier occasions in question was quite different from the present situation.

Apparently, GAF's reference to prior renewal proceedings includes a repetition of previously made, but patently false, allegations concerning the 1981 renewal proceeding. Those allegations — which GAF knew or should have known were false when originally made — have been rebutted, with affidavit support, in prior pleadings,<sup>6</sup> and their backhanded reassertion herein is highly improper. And any comparison with the 1975 renewal proceeding is even more absurd, since it was in settlement of that proceeding that GAF acquired its license — with the Guild's support and pursuant to an agreement to which both it and the Guild were parties.<sup>7</sup>

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skirts the very edges of propriety, given a licensee's duty to be candid and forthcoming in its dealings with the Commission.

In its July 1, 1991 *Consolidated Opposition to Petitions to Deny*, GAF contended that the Guild was responsible for the filing of a competing application for WNCN's license in 1981, and that it thereafter participated in a settlement involving a cash payment by GAF. But as GAF well knew, and as the Guild alleged in response with affidavit support:

"the Guild took positions before the Commission in the 1981 renewal proceeding that were in opposition to those advocated by Classical Radio, Inc. ("Classical"), the competing applicant. Specifically, the Guild then advocated the *renewal* of WNCN's license (subject to a requested condition that would not have benefited Classical) and *opposed* the settlement under which a payment (in which the Guild had no interest or share) was made to Classical. The founders of Classical who resigned from positions in the Guild in 1981 did not act in concert with the Guild then and have had no further association with the Guild in the ten years since."

(Emphasis in original.) Guild *Reply to Opposition to Petition to Deny*, July 21, 1991, at 2 & 3b A

Unlike the 1981 and 1991 renewal proceedings, in which competing applications were filed by former Guild officers, the competing applicant in 1975, Concert Radio, Inc. ("Concert"), was formed by persons with no prior affiliation with the Guild. Concert did, however, offer the Guild and a then-existing Connecticut-based sister organization, representation on its board of directors so as to assure WNCN's listeners continuing input into the station's programming decisions. When Concert, years later, was awarded

The simple fact is that the Guild is entirely independent of Fidelio and has not participated in Fidelio's management. Neither has it either provided Fidelio with, or received from Fidelio, any financial support.

Whatever Fidelio's reasons for requesting the relief sought in the instant Motion may be, the Guild has its own reasons for supporting the grant of that relief. Unless the Commission allows the various proceedings to proceed in an orderly and logical fashion, the Guild is likely to be deprived of the full rights of participation to which it believes it is entitled.

Until the resolution of its pending appeal before the U.S. Court of Appeals, the EEO Branch's action on pending issues raised in the Guild's *Petition to Deny*, and the Commission's action on the Guild's *Petition for Reconsideration* of the *Hearing Designation Order*, the full scope of the issues and of the Guild's rights to participate in the hearing process cannot be ascertained. Allowing the hearing to proceed apace in the Guild's absence thus could irreparably harm its right to full participation to which it is entitled under law.

Turning to the procedural matters raised by GAF's *Opposition*, the Guild submits that GAF's contention that Fidelio's Motion must be dismissed "as an unauthorized and illegitimate application for review of the HDO," misses the essential point of the Fidelio Motion.<sup>8</sup> The relief sought in the Motion could only be granted by the Commission, since no individual arm of the Commission's staff — whether the presiding Administrative Law Judge, the EEO Branch, or the Office of General Counsel, each of which is dealing with only a portion of the complex range of proceedings and issues that will or may affect the Commission's ultimate determination of which applicant is to

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several millions of dollars in damages against GAF for breach of the agreement under which GAF had acquired WNCN, the Guild did not receive any portion thereof

<sup>8</sup> This is equally true of the Bureau's argument to the same effect, *Mass Media Bureau's Motion to Dismiss*, at 2-3, as well as its contention that the Fidelio Motion "was directed to the wrong forum," *id.* at 2.

be licensed — can alone consider the broadest implications of the relative order and timing of the conduct of those proceedings and the resolution of those issues. Only from the perspective that is uniquely available to the Commission itself can the fairness, efficiency and rationality of adjudication in all of said proceedings be maximized.

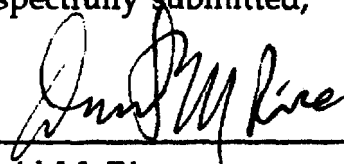
Moreover, the suggestion that the *Fidelio Motion* is tantamount to an application for review disregards the fact that Fidelio has merely asked the Commission to coordinate the timing and sequence in which numerous *already pending* proceedings are to be conducted. Fidelio has not attempted to initiate any new or additional review of the *Hearing Designation Order*. It has asked only that those other proceedings be allowed to run their course prior to the hearing, in order that numerous issues concerning the scope of the hearing issues and the determination of the parties entitled to participate therein can be resolved. thereby simplifying the hearing process and avoiding

discussed by GAF and Fidelio are applicable at all, they should not be interpreted as creating a barrier to the attainment of those goals.

In light of the foregoing, the Guild respectfully requests that the Commission grant the relief requested by Fidelio in its *Motion for Deferral of Procedural Dates*.

Dated: May 6, 1993

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, DAVID M. RICE, hereby certify that the foregoing "COMMENTS ON OPPOSITION TO MOTION FOR DEFERRAL OF PROCEDURAL DATES" was served this 6th day of May, 1993, by mailing a true copy thereof by United States first class mail, postage prepaid, to each of the following:

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